

1  
2  
3  
4 ALIVECOR, INC.,

5 Plaintiff,

6 v.

7 APPLE INC.,

8 Defendant.

9 Case No. 21-cv-03958-JSW

10 **ORDER GRANTING MOTION FOR  
LEAVE TO FILE FIRST AMENDED  
COMPLAINT AND DENYING  
MOTIONS TO SEAL**

11 Re: Dkt. No. 84, 94, 98

12  
13 Now before the Court for consideration is the motion for leave to file first amended  
14 complaint (“FAC”) filed by Plaintiff AliveCor, Inc. (“AliveCor”). The Court has considered the  
15 parties’ papers, relevant legal authority, and the record in the case, and it finds this matter suitable  
16 for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the following reasons, the  
17 Court GRANTS AliveCor’s motion.18 **BACKGROUND**19 AliveCor filed this antitrust lawsuit against Defendant Apple Inc. (“Apple”) on May 25,  
20 2021. (Dkt. No. 1.) AliveCor alleges that Apple monopolized the market for watchOS heart rate  
21 analysis apps through a series of anticompetitive acts, including by changing the watchOS to  
22 prevent competitors, like AliveCor, from offering their version of such apps to Apple Watch users.23 On August 22, 2022, AliveCor filed the present motion seeking leave to supplement the  
24 complaint to assert additional claims, factual allegations, and damages against Apple. AliveCor’s  
25 proposed supplemental complaint alleges Apple has abused the *inter partes* review (“IPR”)  
26 system at the federal Patent and Trademark Office by filing five IPRs for the sole purpose of  
27 driving AliveCor out of business. (See Dkt. No. 84, Ex. 1 (“FAC”).) Specifically, AliveCor  
28 alleges that Apple began filing serial IPRs challenging other pieces of AliveCor’s technology

1 including patents relating to another one of its products, the KardiaMobile Card. (*Id.* ¶¶ 96-98.)  
2 AliveCor alleges that Apple instituted the IPRs solely to force AliveCor to expend resources  
3 defending against those petitions rather than pursuing its antitrust claims. (*Id.* ¶ 98.) AliveCor  
4 alleges the IPRs are motivated by anticompetitive intent and are causally linked to the earlier  
5 anticompetitive acts related to watchOS and the heart rate algorithms. (*Id.* ¶ 105.) AliveCor  
6 alleges it has suffered additional antitrust damages in the form of litigation expenses as a result of  
7 Apple's allegedly anticompetitive litigation scheme. (*Id.* ¶ 147.)

8 Apple filed an opposition to AliveCor's motion. (Dkt. No. 91.) On September 13, 2022,  
9 AliveCor filed its reply. (Dkt. No. 95.) AliveCor subsequently filed a notice of amended reply to  
10 clarify certain statements in its reply brief in response to Apple's request. (Dkt. No. 97.)

11 The Court will address additional facts as necessary in the analysis.

## 12 ANALYSIS

### 13 A. Applicable Legal Standard.

14 AliveCor seeks leave to file a supplemental pleading under Federal Rule of Civil  
15 Procedure 15(d). Under Rule 15(d), “[o]n motion and reasonable notice, the court may, on just  
16 terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or  
17 event that happened after the date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d); *see*  
18 *also Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) (“Rule 15(d) provides a  
19 mechanism for parties to file additional causes of action based on facts that didn’t exist when the  
20 original complaint was filed.”). “While leave to permit supplemental pleading is ‘favored,’ it  
21 cannot be used to introduce a ‘separate, distinct and new cause of action.’” *Planned Parenthood*  
22 *of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (citations omitted). Supplementation is  
23 generally favored as “a tool of judicial economy and convenience.” *Keith v. Volpe*, 858 F.2d 467,  
24 473 (9th Cir. 1988). “To determine if efficiency might be achieved, courts assess ‘whether the  
25 entire controversy between the parties could be settled in one action.’” *Id.* (citation and ellipses  
26 omitted). “The clear weight of authority ... in both the cases and the commentary, permits the  
27 bringing of new claims in a supplemental complaint to promote the economical and speedy  
28 disposition of the controversy.” *Volpe*, 858 F.2d at 473. “While the matters stated in a

1 supplemental complaint should have some relation to the claim set forth in the original pleading,  
2 the fact that the supplemental pleading technically states a new cause of action should not be a bar  
3 to its allowance, but only a factor to be considered by the court in the exercise of its discretion,  
4 along with such factors as possible prejudice or laches.” *Id.*; *see also Copeland v. Lane*, 11-cv-  
5 1058-EJD, 2013 WL 1899741, at \*5 (N.D. Cal. May 6, 2013) (“Matters newly alleged in a  
6 supplemental complaint must have some relation to the claims set forth in the original pleading.”).

7 “The legal standard for granting or denying a motion to supplement under Rule 15(d) is the  
8 same as for amending one under 15(a).” *Paralyzed Veterans of America v. McPherson*, No. C 06-  
9 4670 SBA, 2008 WL 4183981, at \*26 (N.D. Cal. Sept. 9, 2008). The five factors commonly used  
10 to evaluate the propriety of a motion for leave to amend (and thus, a motion to supplement) are:  
11 (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure of  
12 previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the  
13 amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). “[T]he consideration of prejudice to  
14 the opposing party...carries the greatest weight.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316  
15 F.3d 1048, 1052 (9th Cir.2003). Absent prejudice or a “strong showing” of any other *Foman*  
16 factor, there is a presumption in favor of granting leave to supplement. *Id.*

17 **B. The Court Grants Leave to Supplement.**

18 **1. Bad Faith**

19 Leave to amend may be denied if the amendment is introduced solely for delay or  
20 improper purpose. *Foman*, 371 U.S. at 182. Here, AliveCor’s proposed supplement adds a new  
21 theory of antitrust damage. The conduct underlying the proposed supplement allegedly began in  
22 April 2022. Although Apple’s motion gestures at gamesmanship, Apple does not expressly  
23 challenge AliveCor’s motion based on bad faith. Accordingly, the Court finds this factor favors  
24 AliveCor.

25 **2. Futility**

26 A district court should give leave to amend “freely” but may deny leave to amend when  
27 amendment would be futile. Fed. R. Civ. P. 15(a)(2); *Sonoma Cty. Ass’n of Retired Emps. v.*  
28 *Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). Amendment is futile only if “no set of facts

1 can be proved under the amendment to the pleadings that would constitute a valid and sufficient  
2 claim or defense.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (quoting  
3 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). “[C]ourts will determine the  
4 legal sufficiency of a proposed amendment using the same standard as applied on a Rule 12(b)(6)  
5 motion.” *Miller*, 845 F.2d at 214. However, “such issues are often more appropriately raised in a  
6 motion to dismiss rather than in an opposition to a motion for leave to amend.” *Stearns v. Select  
7 Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1154-55 (N.D. Cal. 2010).

8 AliveCor argues that its proposed supplemental allegations are not futile under *Hynix  
9 Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084 (N.D. Cal. 2007) and *USS-POSCO  
10 Indus. v. Contra Costa Cty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800 (9th Cir.  
11 1994), both of which AliveCor argues are exceptions to the *Noerr-Pennington* doctrine’s general  
12 rule that antitrust damages or liability typically cannot be premised on “petitioning” conduct.  
13 Based on AliveCor’s arguments, the Court finds the proposed supplement is not futile.

14 Although Apple maintains that AliveCor’s legal theories fail as a matter of law, it does not  
15 oppose AliveCor’s motion on grounds of futility and instead represents that it intends to challenge  
16 the merits of AliveCor’s new legal theories in a motion to dismiss. According to AliveCor,  
17 Apple’s silence on the futility factor means that Apple cannot prevail on a future 12(b)(6) motion  
18 to dismiss. AliveCor thus asks the Court to bar Apple from moving to dismiss the supplemental  
19 complaint because “any motion to dismiss would become a nullity.” (Am. Reply at 14:1-2.) The  
20 Court declines to do so. AliveCor has satisfied the futility inquiry, but Apple should be afforded  
21 an opportunity to test the new theory on the merits should it so choose. Thus, the Court makes no  
22 decision at this stage regarding the merits of AliveCor’s proposed legal theory.

23 Apple also asks the Court to stay discovery into AliveCor’s new claims pending resolution  
24 of its anticipated motion to dismiss these claims. The Court denies Apple’s request. Apple has  
25 not shown that a stay of discovery is warranted at this time.

26 **3. Undue Delay**

27 Delay alone is insufficient to provide grounds for denying leave to amend. *Eminence  
28 Capital, LLC*, 316 F.3d at 1052. However, “late amendments to assert new theories are not

1 reviewed favorably when the facts and the theory have been known to the party seeking  
2 amendment since the inception of the cause of action.” *Acri v. International Ass’n of Machinists*  
3 & *Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) (citations omitted).

4 AliveCor argues it did not unduly delay in seeking to supplement because the allegedly  
5 anticompetitive IPRs that form the basis of its proposed supplement were instituted between April  
6 and July of this year, the most recent of which was filed just one month prior to the motion to  
7 supplement. Apple argues that it has filed eight IPR petitions beginning in July 2021, and thus  
8 AliveCor has unduly delayed in seeking to supplement the complaint. However, AliveCor’s  
9 proposed allegations challenge just five of Apple’s IPR petitions. AliveCor alleges that these five  
10 petitions—the alleged “anticompetitive” petitions—are distinct from the earlier petitions because  
11 Apple filed them with the intent to drive AliveCor out of business. Based on the allegations in the  
12 proposed supplement, the Court cannot conclude that AliveCor unduly delayed in moving to seek  
13 to supplement to add allegations based on the allegedly “anticompetitive” IPR petitions.

14 This factor weighs in favor of AliveCor.

#### 15 **4. Prior Amendments**

16 Because AliveCor has not amended its complaint previously, this factor weighs in favor of  
17 AliveCor.

#### 18 **5. Prejudice**

19 Apple has the burden to show prejudice. Apple argues that granting leave to supplement  
20 would be prejudicial for two reasons: (1) it would alter the scope of the case; and (2) it would lead  
21 to additional burdensome discovery and a significant delay in discovery proceedings.

22 Prejudice “carries the greatest weight” in the amendment analysis. *Eminence Capital,*  
23 *LLC*, 316 F.3d at 1052. To overcome Rule 15’s liberal policy with respect to amendment of  
24 pleadings, the showing of prejudice must be substantial. *Genentech, Inc. v. Abbott Lab’ys*, 127  
25 F.R.D. 529, 530-31 (N.D. Cal. 1989). In general, neither delay resulting from the proposed  
26 amendment nor the prospect of additional discovery needed by the non-moving party in itself  
27 constitutes a sufficient showing of prejudice. *Id.* at 530-32. Parties opposing amendment have  
28 established prejudice by establishing that the new claims would alter the nature of the litigation,

1       see *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1974, 1079 (9th Cir. 1990), or by  
2 demonstrating that a motion to amend was made after discovery had closed or was about to close.  
3       See, e.g., *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir.2002) (affirming  
4 denial of plaintiff's motion for leave to amend where proposed amendment would have added  
5 additional causes of action which would have required further discovery and discovery was set to  
6 close five days after motion to amend was filed); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir.1999) (stating that “[a] need to reopen discovery and therefore  
7 delay the proceedings supports a district court's finding of prejudice from a delayed motion to  
8 amend the complaint”).

9  
10       Apple argues AliveCor's supplemental complaint would alter the nature of the litigation.  
11       Although “[t]he burden of having to defend a new claim alone is not undue prejudice under Rule  
12 15,” *Dep’t of Fair Emp’t and Hous. v. Law Sch. Admissions Council, Inc.*, No. C-12-1830 EMC,  
13 2013 WL 485830, at \*5 (N.D. Cal. Feb. 6, 2013), Apple can show prejudice by establishing that  
14 the new claims would alter the nature of the litigation. *See Morongo Band of Mission Indians*, 893  
15 F.2d at 1079.

16       According to Apple, the current case focuses on Apple's watchOS product design and its  
17 alleged effect on competition in the alleged markets for wearable technology and heartrate  
18 analysis watchOS apps. Thus, Apple contends permitting AliveCor to allege a new theory of  
19 antitrust injury based on Apple's patent litigation strategy, the costs of litigation, and the effect of  
20 that litigation on competition has nothing to do with AliveCor's alleged antitrust claims. Apple  
21 asserts the new allegations advance different legal theories and require proof of different facts,  
22 which will complicate and delay the case. AliveCor does not dispute that the supplemental  
23 allegations present a new theory of damage that will require proof of different facts, but it  
24 maintains that the new allegations are casually connected to and inextricably linked to its existing  
25 antitrust claims.

26       The Court agrees with Apple that the proposed supplemental allegations advance a new  
27 legal theory. However, while the supplemental allegations will broaden the scope of the case, the  
28 Court cannot conclude that permitting leave to supplement would alter the nature of the litigation

1 so greatly that prejudice would result. The Court finds that AliveCor's supplemental allegations  
2 are sufficiently connected to the existing antitrust claims.

3 Apple's cited cases are distinguishable. For example, in *Morongo Band of Mission*  
4 *Indians*, the original complaint sought to enforce an ordinance regulating bingo games on the  
5 reservation. *Id.* at 1076. Two years after the district court dismissed for lack of jurisdiction, the  
6 Band moved for leave to file an amended complaint alleging new claims based on RICO and  
7 criminal depredation and trespass statutes. *Id.* at 1079. The Ninth Circuit affirmed the district  
8 court's denial of leave to amend based on inordinate delay, prejudice to the defendants, the  
9 tenuous nature of the claims, and the fact that the amendment complaint would greatly change the  
10 nature of the litigation. *Id.* Here, in contrast, although AliveCor seeks to supplement to pursue a  
11 new theory of antitrust damages based on additional factual allegations, the nature of the litigation  
12 remains rooted in Apple's alleged anticompetitive acts.

13 Additionally, *Morongo Band of Mission Indians* and many of the other cases Apple cites  
14 are distinguishable because in those cases several of the *Foman* factors supported amendment in  
15 addition to the potential for prejudice. *See, e.g., id.* (affirming district court's denial of leave to  
16 amend based on undue delay and prejudice where the plaintiffs sought to amend two years after  
17 filing the original complaint and alleged new trespass and RICO claims); *AmerisourceBergen*  
18 *Corp. v. Dialysis West, Inc.*, 465 F.3d 946, 955 (9th Cir. 2006) (affirming the district court's  
19 denial of leave to amend based on timeliness and prejudice where the party seeking leave to  
20 amend had waited fifteen months to move and the information underlying the amendment had  
21 been available at the time of the original filing); *Suzuki v. Helicopter Consultants of Maui, Inc.*,  
22 No. CV 13-00575 JMS/KJM, 2016 WL 3753079, at \*10 (D. Haw. July 8, 2016) (undue delay and  
23 prejudice). Here, however, the other *Foman* factors favor granting leave to supplement.

24 Apple further argues it will be prejudiced by the additional discovery required by the  
25 supplemental claims. Apple contends the discovery would be burdensome, would undo the  
26 parties' progress in negotiating discovery disputes to date, and would require new custodians,  
27 search terms, and initial disclosures. AliveCor argues the proposed supplemental allegations will  
28 require incremental additional discovery and will not delay the case.

1       The Court is not entirely convinced by AliveCor's attempt to minimize the additional  
2 discovery burdens that will attach if the motion to supplement is granted. There is no doubt that if  
3 the Court grants AliveCor's motion, Apple will have to expend additional time and incur  
4 additional costs to conduct additional discovery. However, the Court is not persuaded that the  
5 prejudice Apple may face from this additional discovery warrants denial of the leave to  
6 supplement. As an initial matter, the prospect of additional discovery does not in itself constitute  
7 a sufficient showing of prejudice. *Tyco Thermal Controls LLC v. Redwood Industrials*, No. 06-  
8 cv-7164-JF, 2009 WL 4907512, at \*3 (N.D. Cal. Dec. 14, 2009). Additionally, unlike in many of  
9 Apple's cited cases, discovery is ongoing, and AliveCor's request does not come on the eve of  
10 discovery's close; the fact discovery deadline is still several months away.<sup>1</sup> Although Apple  
11 speculates that discovery into AliveCor's new theory will involve complicated privilege issues and  
12 additional custodians, AliveCor has represented that the discovery it needs will be within the  
13 purview of the existing discovery custodians and can be completed within the current case  
14 schedule. Thus, the Court concludes that the prejudice Apple faces at the prospect of conducting  
15 additional discovery is not of such magnitude that it warrants denial of AliveCor's motion. See  
16 *PNY Techs., Inc. v. SanDisk Corp.*, No. 11-cv-04689-WHO, 2014 WL 294855, at \*4 (N.D. Cal.  
17 Jan. 27, 2014).

18       The Court finds the relevant factors, on balance, counsel in favor of granting AliveCor's  
19 motion for leave to supplement. Additionally, the Court finds that denying AliveCor's motion  
20 would not promote judicial efficiency, which is the primary goal of Rule 15(d).

21 **C. The Court Denies AliveCor's Motions to Seal.**

22       AliveCor requests leave to file portions of its reply and supporting declarations under seal.  
23 There is a presumption of public access to judicial records and documents. *Nixon v. Warner*  
24 *Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Accordingly, a party seeking to file a motion to seal in  
25 connection with a non-dispositive motion must show "good cause" under Federal Rule of Civil  
26 Procedure 26(c). *In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115,  
27

---

28 <sup>1</sup> The Court recently granted the parties' request to extend certain discovery deadlines. (See Dkt. No. 103.)

1 1119 (9th Cir.2012); *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir.2010) ("In light of  
2 the weaker public interest in nondispositive materials, we apply the 'good cause' standard when  
3 parties wish to keep them under seal."). "[T]he party seeking protection bears the burden of  
4 showing specific prejudice or harm will result," *Phillips ex rel. Estates of Byrd v. Gen. Motors*  
5 *Corp.*, 307 F.3d 1206, 1210-11 (9th Cir.2002), and must make a "particularized showing of good  
6 cause with respect to any individual document," *San Jose Mercury News, Inc. v. U.S. Dist. Court,*  
7 *N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir.1999). "Broad allegations of harm,  
8 unsubstantiated by specific examples or articulated reasoning" are insufficient. *Beckman Indus.,*  
9 *Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.1992).

10 AliveCor seeks to seal portions of its reply and supporting materials on the basis that they  
11 relate to the same facts that Apple previously requested to be sealed in connection with the parties'  
12 Supplemental Protective Order. However, the information sought to be sealed makes only general  
13 references to the sealed Supplemental Protective Order. Apart from the conclusory statement that  
14 the material references previously sealed materials, AliveCor has not identified any private or  
15 public interest that warrants sealing and has not articulated any harm that will result if the specific  
16 content is not sealed. Additionally, although AliveCor represents that it seeks to seal the  
17 information as a professional courtesy to Apple, Apple has not filed a declaration in support of  
18 sealing. For these reasons, the Court finds AliveCor has not met the good cause standard  
19 necessary to overcome the presumption of public access. The Court DIRECTS AliveCor to file  
20 public versions of all documents for which the proposed sealing has been denied within seven  
21 days from the date of this Order.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

## CONCLUSION

For the foregoing reasons, the Court GRANTS AliveCor's motion for leave to file an amended complaint and DENIES AliveCor's motions to seal. AliveCor shall file the FAC attached as Exhibit 1 to its motion within seven days from the date of this Order.

**IT IS SO ORDERED.**

Dated: October 18, 2022

  
Jeffrey S. White  
United States District Judge

United States District Court  
Northern District of California